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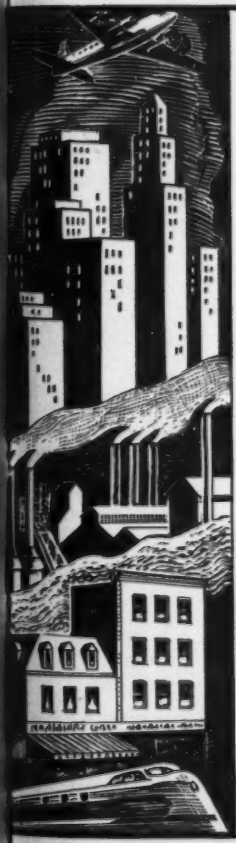

THE LILLY CASE

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CORPORATION JOURNAL
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AUGUST—SEPTEMBER 1961

Contents

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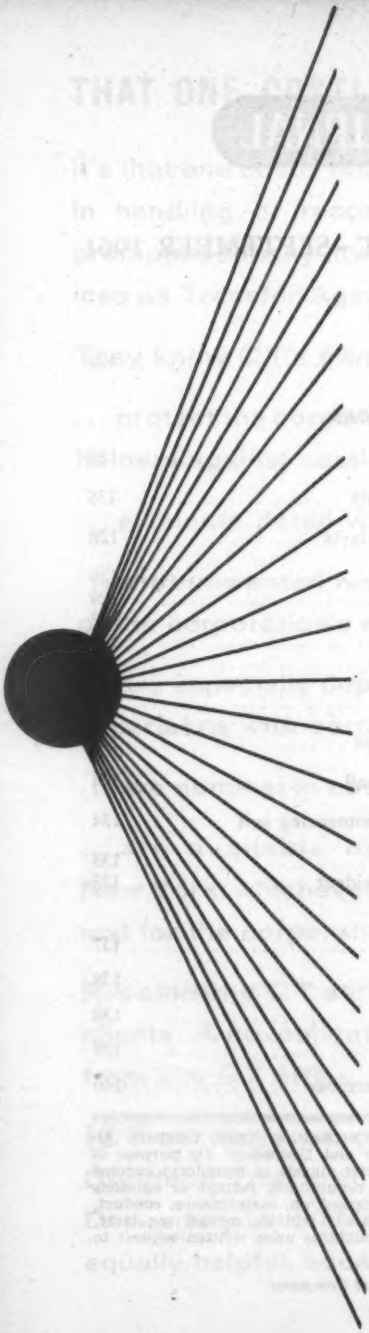

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THE LILLY CASE

FOR the first time in seventeen years,[1] the United States Supreme Court has handed down an opinion on the necessity of qualification by an unlicensed foreign corporation. On May 22nd of this year, the court affirmed the decision of the New Jersey Supreme Court in the case of *Eli Lilly and Company v. Sav-On Drugs, Inc.*,[2] holding that the Lilly Company, an unlicensed foreign corporation, could not maintain suit in New Jersey to enforce its Fair Trade agreements in that state. Although the decision of the United States Supreme Court turned on the relatively narrow question of whether or not the activities of the Lilly Company constituted intrastate business, the court concluding that they did, the significance of the decision is far wider. The court took the opportunity afforded by the case to reaffirm its position that a corporation engaged exclusively in interstate commerce with respect to a particular state cannot be required by that state to qualify.

Although this concept has long been considered well settled law,[3] there was reason to believe that it might be modified, if not completely overthrown, when the court handed down its decision in the *Lilly* case. The opinion of the New Jersey Superior Court, affirmed by the New Jersey Supreme Court,[4] appeared to rest less on the "intrastate activities" of the Lilly Company than on the absence of any real burden, in the court's opinion, imposed by the New Jersey qualification procedure. The opinion of the Superior Court can be read as requiring even a foreign corporation engaged exclusively in interstate commerce to qualify. In view of the United States Supreme Court decisions sustaining increased state jurisdiction of foreign corporations engaged exclusively in interstate commerce, both with respect to taxation[5] and service of process,[6] a decision requiring such a corporation to qualify would not have been wholly unexpected.

Whether corporations engaged exclusively in interstate commerce will continue to be immune from state qualification requirements is open to question. The majority opinion in the *Lilly* case clearly supports this immunity. However, at least one Justice has reserved that question until a case involving such a corporation reaches the court.[7]

The plaintiff in the *Lilly* case was an Indiana corporation not authorized to transact business in New Jersey. It brought suit in the Superior Court of New Jersey, Chancery Division, to compel the defendant, a retail drug company, to comply with minimum prices fixed for

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[1] *Union Brokerage Co. v. Jensen*, 64 S. Ct. 967, 322 U. S. 202, decided in 1944 and involving a customhouse brokerage business in Minnesota, was the last case in which the Supreme Court passed on a question of qualification.

[2] 81 S. Ct. 1316, rehearing denied 81 S. Ct. 1913, Docket No. 203; affirming 31 N. J. 591, 158 A. 2d 528.

[3] *Furst & Thomas v. Brewster*, 282 U. S. 493, 51 S. Ct. 295 (1931); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106 (1931); *York Mfg. Co. v. Colley*, 247 U. S. 21, 38 S. Ct. 430 (1918); *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 S. Ct. 57 (1914); *International Text Book Co. v. Peterson*, 218 U. S. 664, 31 S. Ct. 225 (1911); *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481 (1910).

[4] 57 N. J. Super. 291, 154 A. 2d 650; affirmed 31 N. J. 591, 158 A. 2d 528.

[5] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357 (1959); *Scripto v. Carson*, 80 S. Ct. 619 (1960).

[6] *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1946).

[7] Mr. Justice Harlan, concurring: "Because I am of the view that Eli Lilly has engaged in 'local business' in New Jersey, there is no need now to consider whether a wholly interstate business enjoys the same degree of immunity from state licensing provisions when the state requirement is regulatory as it does when the state requirement is purely a tax measure."

the resale of plaintiff's products in accordance with the New Jersey Fair Trade Act.

The facts were substantially undisputed. Plaintiff, one of the largest dealers of pharmaceutical products in the country, distributed its products throughout the United States and in foreign countries. Its office and principal place of business was in Indiana. Plaintiff's products were not sold directly to the retail trade, but to wholesale distributors who, in turn, sold the products to the retail trade. Plaintiff owned no real estate and maintained no warehouse in New Jersey. It did have an office in New Jersey with its name on the door, on the tenant registry in the lobby of the building, and in the local telephone directory. The lessor of the office was plaintiff's district manager in charge of its marketing division for the area. There was a secretary in the office, as well as 18 "detailmen" under the supervision of the plaintiff's district manager.

The detailmen, many of whom resided in New Jersey, were paid on a salary basis, but received no commissions. Their functions were promotional and informational, including visiting retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff, examining the stocks and inventory of retailers and making recommendations relating to supply, and distributing promotional material. As a service to the retailer, a detailman might receive an order for plaintiff's products for transmittal to a local wholesaler. All of plaintiff's Fair Trade contracts, however, and all orders from the wholesalers for its products, were subject to acceptance in Indiana.

Plaintiff had approximately 1500 Fair Trade agreements in effect in New Jersey signed by retailers of its products who agreed to maintain the minimum prices on plaintiff's products. Defendant had not signed a contract, but admitted having notice of the existence of plaintiff's Fair Trade contracts and that it was, therefore, bound to maintain the minimum prices on plaintiff's products, unless its other defenses should prevail.

The defendant's substantial defense was that plaintiff, as a foreign corporation doing business in New Jersey, was required to qualify before it could institute suit in the state on any contract made by it in the state.[8] The Superior Court, Judge Scherer, turned its attention to the question of whether or not plaintiff was "doing business" in New Jersey. The court cited several decisions turning on whether the activities of a particular corporation constituted "doing business" so as to subject it to service of process, The court applied the tests set forth in these cited authorities to the activities of plaintiff, and concluded that the plaintiff was doing business so as to require qualification. It is to be noted that the degree of business activity required by the courts to subject a corporation to service is usually less than that which would require qualification, and the same tests are not ordinarily considered applicable to a qualification issue.[9]

In answer to the plaintiff's argument that it was engaged entirely in interstate commerce, and that to impose the New Jersey qualification requirements on it would constitute an unlawful burden thereon, the New Jersey court, among other cases, cited the recent United States Supreme Court decision in *Northwestern States Portland Cement Co. v. State of Minnesota*.[10] In that case, the Supreme Court of the United States sustained the right of a state to levy a properly ap-

[8] R. S. 14:15-3, 14:15-4 and 14:15-5.
[9] *Tignor v. L. G. Balfour & Co.*, 167 Va. 58, 187 S. E. 468.
[10] 358 U. S. 450, 79 S. Ct. 357. (THE CORPORATION JOURNAL, April—May 1959, page 214.)

portioned net income tax upon a foreign corporation engaged exclusively in interstate commerce, if the tax is not discriminatory, and if the local activities of the corporation constitute a sufficient nexus to justify its imposition. The New Jersey court, in the Lilly case, reasoned that "if the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?" The court added: "The simple requirements of our Corporation Act are reasonable and cannot be called burdensome. To hold that these regulations constitute such a burden upon interstate commerce as to exempt the plaintiff from the provisions thereof is to indulge in an unwarranted legalism."

This use of the *Northwestern* decision as authority for deciding a question of qualification was unprecedented. The United States Supreme Court was careful to point out in its opinion in the *Northwestern* case that an income tax imposed for the *privilege* of doing business would be invalid if imposed on a corporation exclusively in interstate commerce.[11]

The New Jersey court disposed of plaintiff's final arguments, to the effect that this was not an action on a contract made in New Jersey, and concluded that the action was barred by two New Jersey statutes, R. S. 14:15-4 and 14:15-5, N. J. S. A.

R. S. 14:15-4 prohibits an unlicensed foreign corporation doing business in New Jersey from maintaining suit "upon any contract made by it in this state." R. S. 14:15-5 is a retaliatory statute, imposing on foreign corporations in New Jersey the same obligations that are imposed on New Jersey corporations by the foreign state. Since a comparable Indiana statute bars suits arising out of tort or contract, whether at law or in equity, plaintiff's suit was regarded as barred, regardless of the nature of the cause of action.

The New Jersey trial court denied plaintiff's application for an interlocutory injunction, and granted defendant's motion for summary judgment, and the New Jersey Supreme Court affirmed the judgment "for the reasons expressed in the opinion of Judge Scherer in the Court below." The United States Supreme Court affirmed that judgment on May 22, 1961, holding that the Lilly Company was doing intrastate business in New Jersey and therefore was required to be qualified in order to maintain suit.

Mr. Justice Black, delivering the opinion of the court, reaffirmed at the outset the immunity of foreign corporations engaged exclusively in interstate commerce from state qualification requirements: "It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers. Under the authority of the so-called 'drummer' cases, such as *Robbins v. Taxing District of Shelby County*,[12] Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State."

An examination of the facts, however, convinced the highest court that Lilly was doing intrastate business. "To hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality." The court pointed out that the eighteen detailmen, "working out of a big office in Newark, New Jersey, with Lilly's name

[11] Citing *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951).
[12] 120 U. S. 489.

on the door and in the lobby of the building, and with Lilly's district manager and secretary in charge, have been regularly engaged in work for Lilly which relates directly to the intrastate aspects of the sale of Lilly's products. These eighteen 'detailmen' have been traveling throughout the State of New Jersey promoting the sales of Lilly's products, not to the wholesalers, Lilly's interstate customers, but to the physicians, hospitals and retailers who buy those products in intrastate commerce from the wholesalers."

The fact that the "inducing" of intrastate sales engaged in by Lilly was primarily promotional and not actual solicitation of orders, the court concluded, went to the nature of the intrastate business and not to the question of whether or not intrastate business was being carried on.

The court disposed of Lilly's contention that the suit arose out of the interstate aspects of its business, and therefore could not be barred even if Lilly were doing intrastate business as well, determining that the Fair Trade contract was entirely separable "from any particular interstate sale."

The final question considered by the court was Lilly's contention that the question of whether or not it was engaged in interstate commerce was not properly before the court. Lilly argued that the New Jersey court's decision rested on the assumption that it was engaged exclusively in interstate commerce. The court concluded that the only reasonable inference from the findings of the New Jersey court was that that court had concluded that Lilly was transacting intrastate business. The Supreme Court cited a subsequent New Jersey decision which had so interpreted the *Lilly* decision.[13] But, the court concluded, "even if the opinion of the court below should, as is urged, be interpreted as resting upon the mistaken belief that appellant could be required to register, even though it transacted no business whatever in New Jersey except interstate business, we think it would still be necessary to affirm the decision of that court on the record presently before us. That record clearly shows that Lilly was, as a matter of fact, engaged in local intrastate business in New Jersey . . ."

The significance of the Lilly decision is primarily in its reaffirmation of the immunity of foreign corporations engaged exclusively in interstate commerce from state licensing requirements. The trend in Supreme Court decisions toward increasing state jurisdiction over interstate corporations, evidenced by that Court's rulings in the taxation and service of process areas, has stopped short of requiring qualification. In addition, an important activity has been held to constitute intrastate business and to require qualification. Thus, a foreign corporation which engages in promotional activities, "inducing" purchases of its products indirectly from its wholesalers, even though all its own sales are interstate, will have to consider qualification.

[13] *United States Time Corp. v. Grand Union Co.*, 64 N. J. Super. 39, 165 A. 2d 310.

domestic corporations

NEW YORK

Inspection by stockholder of records of corporation permitted where corporation's proof of bad faith was insufficient.

A stockholder petitioned the court for an order permitting him to inspect the records of the corporation. The Supreme Court, Special Term, Nassau County, Part I, observed that although a stockholder's right to inspection was a qualified right, resting in the court's discretion, the stockholder was not required to sustain the burden of proving his good faith. On the contrary, the corporation had the burden of proving the stockholder's alleged bad faith. Concluding that the corporation's proof of bad faith was insufficient, the court granted the order permitting inspection.

In re Combined Industries, Inc., 212 N. Y. S. 2d 129. Shephard Kole, for petitioner. Morton L. Cortilman and John W. M. Rutenberg, for respondent.

OHIO

Shareholders who made demand through an agent for fair cash value of their stock held entitled to have fair cash value determined where demand was accepted and acted upon by company.

This was an action by certain shareholders for the fair cash value of their stock under the provisions of Section 1701.85, Revised Code of Ohio, which provides for such payment to stockholders objecting to a merger. Certain shareholders made demand through an agent, and the corporation alleged that this was not compliance with the statutory requirement that the demand be made by the shareholder.

The Court of Appeals of Ohio, Scioto County, observed that the letter of the agent in which he demanded the fair cash value of the stock of these shareholders, representing himself as their agent, was accepted by the company and acted upon. In answer to the letter the company made a counter offer and requested the various shareholders to deliver their certificates of stock to have the proper legend endorsed thereon. By complying with the company's request and delivering their certificates for the endorsement, the Court was of the opinion that the shareholders recognized the fact that the agent had acted as their representative, and concluded that they had complied with the statute and were entitled to have the fair cash value of their stock determined. The judgment of the trial court to that effect was affirmed.

Clark v. Rockwood & Co., 168 N. E. 2d 592. William L. Howland, Robert K. McCurdy, William H. Horr and William A. Burke, of Portsmouth, for appellees. Chester P. Fitch, of Portsmouth, and Stanford Clinton, for appellant.

foreign corporations

FLORIDA

Unlicensed foreign corporation held not barred by statute from enforcing its rights under the United States Constitution.

Plaintiff, a New Jersey corporation not licensed to do business in Florida, brought an action to cancel the 1959 personal property assessment against its tangible personal property on the ground that such property was exempt from taxation under the Import-Export Clause of the United States Constitution. The lower court dismissed plaintiff's complaint on the ground that as an unlicensed foreign corporation it was not entitled to maintain suit in the state courts, and plaintiff appealed.

The District Court of Appeal of Florida, Third District, citing the Florida Supreme Court, concluded that the statute which required a foreign corporation to comply with the state qualification requirements did not preclude a corporation which had not complied from adjudicating rights acquired under the Federal Constitution. The decision of the lower court dismissing the complaint was reversed.

Frederick B. Cooper Co., Inc. v. Overstreet, 126 So. 2d 744. Kommel & Rogers, of Miami Beach, for appellant. Darrey A. Davis, County Atty., and St. Julien P. Rosemond, Asst. County Atty., of Miami, for appellees.

MINNESOTA

Service in tort action upheld under statute where defendants' selling was limited to solicitation of orders by mail.

The question, in a tort action, was whether the two defendant foreign corporations had sufficient minimal contacts with the State of Minnesota so as to subject them to suit under Minn. St. 303.13. One company manufactured doors, which were sold by the other by means of mailing price lists to customers from Grand Rapids, Michigan. Orders were placed by customers through the mails to Grand Rapids. Neither corporation had any resident agent in Minnesota nor any agent coming into that state. Doors were sold to a local Minnesota lumber company which sold one of the doors to the plaintiff, who was allegedly injured by reason of an asserted defect in the manufacture and assembly of the door and by the subsequent, purportedly negligent act of the sales company in selling the door in its allegedly defective condition.

The Supreme Court of Minnesota affirmed a judgment holding the defendants subject to the jurisdiction under Section 303.13. That section provides that "if a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, or if such foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the

foreign corporation of the Secretary of the State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against the foreign corporation arising from or growing out of such contract or tort."

Adamek v. Michigan Door Company et al., CCH MINNESOTA TAX REPORTS ¶ 200-173, 108 N. W. 2d 607. Scow & Gray, of Long Prairie, for appellants, Charles W. Kennedy, Bradford & Kennedy, of Wadena, and Don E. Kennedy, of Staples, for respondent.

NEW YORK

Suit by unlicensed corporation's assignee allowed on contract not made in state, where interstate commerce was furthered.

Defendant moved to dismiss the complaint on the ground that plaintiff lacked legal capacity to sue under Section 218, General Corporation Law. That section bars the assignee of an unlicensed foreign corporation from suing, in addition to barring the foreign corporation.

Plaintiff's assignor was a Georgia corporation whose mill and main office were in Georgia. The Supreme Court, Special Term, New York County, Part I, remarked: "The papers submitted fail to establish that, at the time of the making of the contracts in suit, plaintiff's assignor was doing business in New York State within the meaning of § 218, General Corporation Law. The fact that plaintiff's assignor had an office-showroom and a sales manager in New York is not sufficient to establish that it was doing business within the state. It is undisputed that the company did not maintain a bank account in New York. More importantly, all orders had to be approved by the Georgia office and all shipments were made from its mill in Georgia. Under the circumstances, the court finds that plaintiff's assignor was not doing business within the state."

Noting that it was clear that the contracts in question were made in Georgia, and not in New York, the motion to dismiss was denied.

James Talcot, Inc. v. J. J. Delaney Carpet Co., 213 N. Y. S. 2d 354. Otterburg, Steindler, Houston & Rosen (Arthur A. Greenfield, of counsel), of New York City, for plaintiff. La Porte & Meyers (Norman Marcus, of counsel), of New York City, for defendant.

Nonresident stockholder who has complied with the provisions of the New York Stock Corporation Law held entitled to inspection of books and records of licensed foreign corporation.

This was a motion by a Massachusetts stockholder for inspection of certain books and records of a Delaware corporation. The corporation was authorized to transact business in New York, maintained its principal office there, had at least one resident officer, and employed accountants and lawyers located in New York City.

The New York Supreme Court, Special Term, Part I, determined first that the stockholder was acting in good faith. Turning its attention to the contention of the corporation that the

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court lacked jurisdiction because of diversity and because most of the corporation's books and records were in Delaware, the court concluded that, under the circumstances set forth above, a stockholder who complied with the provisions of the New York Stock Corporation Law had a clear right to an inspection of corporate books and records. "Nothing in the law suggests that residency within this state is a prerequisite to the bringing of the instant proceeding." As to the contention of the corporation that most of its books and records were in Delaware, the court was "of the opinion that petitioner has amply demonstrated his right to the inspection he seeks," and "he should be afforded that right whether here or in Delaware or at both locations."

Matter of Davis (S. & P. Nat. Corp.), New York Supreme Court, Special Term, Part I, New York Law Journal, No. 96, November 18, 1960, page 13.

Petition for inspection of stock record book of foreign corporation granted where petitioner had good reason to believe that there had been mismanagement and waste and desired to secure the support of other stockholders for a demand for inspection of the books of account.

Petitioner, the owner of less than 5% of the outstanding stock of respondent Maryland corporation, moved for an order directing respondent corporation to permit inspection of its stock record book. Under the laws of Maryland, only stockholders holding 5% of the outstanding stock may demand an inspection of the books of account, and petitioner "therefore desires that he have an inspection of the stock book in order to secure the support of other stockholders for a demand for an inspection of the books of account."

The Supreme Court, Special Term, New York County, Part I, observed that the corporation had refused to comply with the Maryland law requiring it to prepare "a full and correct statement of the affairs of the corporation, including a balance sheet and a financial statement of operations for the preceding fiscal year." The Court also noted that "the petitioner has good reason to believe that there has been mismanagement and waste," and concluded that the corporation's allegations that petitioner's purpose was not in the interest of the business of the corporation but was in bad faith was not made out. The motion for inspection was granted.

Application of King-Size Publications, Inc., 203 N.Y.S. 2d 637. Walter S. Cooper, for petitioner. Riesner & Jawitz (Julian Jawitz, of counsel), for respondents.

Order setting aside service of process was reversed where maintenance of sales force in state raised question of fact as to whether corporation was doing business in state.

This was an appeal by the plaintiff from an order setting aside service of process on defendant foreign corporation. The record did not show that there was any office, bank account or telephone listing in the defendant's name in the state, but it did appear that the defendant corporation had divided the state into districts and

had engaged a number of sales agents to solicit orders therein. The orders were accepted at the defendant's home office in Cleveland. The sales agent upon whom process was served also held the title of territory supervisor, and about one-quarter of his time was occupied in the training of other sales agents.

The Supreme Court, Appellate Division, Fourth Department, was of the opinion that the "regular maintenance of a sales force, if of sufficient magnitude and organized, may constitute 'doing business' in the state." Concluding that the affidavits presented failed to sustain the corporation's claim that it was not doing business in the state, but raised a question of fact to be determined at the trial, the order setting aside the service was reversed.

Grunder v. Premier Industrial Corp., 211 N.Y.S. 2d 421. James E. Hart, of Corning, for appellant. Cole & Walker (Robert Cole, of counsel), of Bath, for respondent.

OKLAHOMA

Unlicensed foreign corporation selling through distributor held subject to service of process by service on Secretary of State where its overall activities in Oklahoma constituted doing business.

Plaintiff brought this action for injuries allegedly sustained as a result of using defective equipment of one of the defendants. Service was attempted on that defendant, an unlicensed foreign corporation, by service on the Secretary of State under 18 Oklahoma Statutes, Sec. 472. The United States Court of Appeals, Tenth Circuit, observed that whether the service was proper depended on whether the defendant was or had been doing business in Oklahoma. Defendant had, by contract, appointed another corporation its distributor, agent and representative for the distribution of its hoisting equipment. The distributor made sales and rental agreement for such equipment at prices and on terms and conditions prescribed by the defendant, and forwarded records of such transactions to defendant monthly. It assisted defendant in the collection of amounts due. Title to the equipment remained in defendant until payment was made to it directly by the purchasers or lessees. In 1958, defendant displayed its equipment at an exposition in Oklahoma, at which its own representatives sold at least four pieces of the equipment.

The Court of Appeals held that "not only by the contract of the parties but by the overall activities of the parties thereto in carrying out its spirit and purpose, as well as" defendant's "activities in Oklahoma in furtherance of the sale and rental of equipment which it at all times owned," defendant "was engaged in carrying on or doing business in Oklahoma within the meaning of the Oklahoma Statutes providing for service of process on nonresident corporations."

Abel v. Albina Engine & Machine Works, 284 F. 2d 510. L. D. Hoyt, of Oklahoma City, (A. K. Little, of Oklahoma City, on the brief), for appellant. John A. Johnson, of Oklahoma City, for appellee.

OREGON

Service on withdrawn corporation by service on the corporation commissioner set aside where made by certified mail.

Defendant foreign corporation had withdrawn from Oregon after this cause of action arose but before the complaint was filed. Plaintiff attempted to serve defendant by sending the summons and complaint to the state corporation commissioner by certified mail. Holding that in the case of a withdrawn corporation there must be personal service upon the commissioner, the lower court quashed the service, and plaintiff appealed.

The United States Court of Appeals, Ninth Circuit, noted that the Oregon statute applicable to the withdrawal of foreign corporations, ORS 57.721, provides that service may be made on the commissioner, but does not specify how such service is to be accomplished. The court observed, however, that "this void appears to be filled by another statute dealing with the service of process in general," ORS 15.080, which specifically prescribes personal service on the agent or attorney of "a person who has appointed some officer of this state his agent or attorney to receive and accept such service." The court concluded that the commissioner was in effect appointed defendant's agent to accept service, and "was not authorized to accept service in a manner not prescribed by statute." The judgment of the lower court quashing the attempted service by certified mail was affirmed.

Grabner v. Willys Motors, Inc., 282 F. 2d 644. Bailey, Lezak, Swink & Gates, Sidney I. Lezak, Philip A. Levin, of Portland, for appellant. Tooze Kerr & Tooze, Edwin J. Peterson, of Portland, for appellee.

RHODE ISLAND

Statute prohibiting unqualified foreign corporations from maintaining suit on contracts made in state held not to bar such corporation from instituting such suit and qualifying during trial.

The question presented here was whether a foreign corporation which had entered into a contract accepted in Rhode Island and failed to comply with the qualification requirements of Rhode Island was barred from "instituting" in any of the courts of that state an action to enforce a contract made by it in the state. The controlling statutory provision, G. L. 1956, § 7-2-28, provided that "no action at law or suit in equity shall be maintained or recovery had by any such corporation on any contract made within this state in any of the courts of this state so long as it fails to comply with the" qualification requirements. The plaintiff foreign corporation had qualified to do business in Rhode Island during the course of the trial.

The Supreme Court of Rhode Island, observing that the use of the word "maintain" in the provision quoted above meant to continue with something already commenced, concluded that the statute did not prohibit the "institution" of such an action. In addition, the court was of the opinion that the language of § 7-2-23, to the effect that "every foreign corporation as a condition precedent to carrying on business in this state, or to enforcing in the courts of this state any contract made

within this state" shall qualify to do business, should be construed liberally and therefore did not bar the "institution" of suit by such corporations.

New England Die Co. v. General Products Co., 168 A. 2d 150. Max Winograd, Marshall B. Marcus, of Providence, for appellee New England Die Co., Inc. Goodman, Semonoff, Gorin & Blease, Ralph P. Semonoff, Martin M. Tenikin, of Providence, for appellant General Products Co., Inc.

TEXAS

Unlicensed foreign corporation held not barred from enforcing contract as a matter of law where question was presented as to whether transaction sued upon was interstate or intrastate in character.

This was an appeal from a summary judgment. Plaintiff unlicensed foreign corporation, appellant here, contended primarily that a factual issue had been presented to the trial court as to whether the *very* transaction plaintiff had sued upon was intrastate or interstate in character, and that therefore a summary judgment should not have been entered. There was evidence in the record which, in the opinion of the court, might support a finding that the corporation had engaged in intrastate transactions.

The Court of Civil Appeals of Texas, Fort Worth, referred to the Texas statute prohibiting an unqualified foreign corporation "from bringing and prosecuting suit in the courts of this State upon any transaction which was an intrastate transaction." The court concluded, however, that an unlicensed foreign corporation had the right to sue "upon a transaction which was interstate in character despite the fact that it might have engaged in intrastate transactions at about the same time upon which any right to sue in the state courts would be inhibited by the provisions of the law." Since whether or not the *very* transaction sued upon was intrastate or interstate in character was a relevant factual question, the summary judgment was reversed and the case remanded for trial.

Warner Electric Brake & Clutch Co. v. Bessemer Forging Co., 343 S. W. 2d 471. Ungerman, Hill, Ungerman & Angrist, M. E. Clough, of Fort Worth, for appellant. Walker, Day & Harris, Philip R. Bishop, of Fort Worth, for appellee.

Unlicensed foreign corporation held not subject to service of process by service on state official where only allegation of "doing business" was that corporation had entered into contract with resident to be performed in state.

This was an action for breach of contract. One of the questions involved was whether the service of process on defendant unlicensed foreign corporation by service on the Secretary of State, under Article 2031b, Vernon's Ann.Civ.St.Tex., violated the due process clause of the Fourteenth Amendment. Article 2031b authorized such substituted service where the unlicensed foreign corporation has entered "into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State." Plaintiff confined itself to alleging this minimum statutory requirement of jurisdiction, alleging no other act of defendant which would constitute doing business.

The United States District Court, S. D. Texas, after examining the leading United States Supreme Court opinions dealing with this question, concluded that the personal jurisdiction obtained under the letter of Article 2031b violated the due process clause. The determination of whether defendant had a "substantial connection" with the forum state, which the court considered essential to jurisdiction, required "evaluation of the facts in each situation. The factors to be studied may include the nature and character of the business, the number and type of activities within the forum, whether such activities give rise to the cause of action, whether the forum has some special interest in granting relief, and the relative conveniences of the parties." Such an evaluation, the court pointed out, could not be made in the case at bar since plaintiff merely alleged the minimum statutory requirement of a contract with a resident to be performed in whole or in part in Texas. Defendant's motion to quash the summons and complaint was granted.

Lone Star Motor Import, Inc. v. Citroen Cars Corp., 185 F. Supp. 48. Hirsch & Westheimer, W. R. Ellis, of Houston, for plaintiff. Fulbright, Crooker, Freeman, Bates & Jaworski, W. N. Arnold, Jr., of Houston, for defendant.

taxation

IOWA

Retailer, in computing sales tax, held not entitled to deduct from taxable gross receipts the cost to it of trading stamps given customers.

"The question presented," said the Supreme Court of Iowa, "is whether, in computing the sales tax due the state, a retailer is entitled to deduct from its gross receipts, as discounts, the cost to it of S & H stamps given customers."

The plaintiff retailer made a written contract with a New Jersey corporation to use its "co-operative cash discount system," agreeing to purchase "co-operative discount stamps" which were offered to plaintiff's customers, redeemable in merchandise, or in cash at the purchaser's option.

The court, after an examination of the sales tax definition of "gross receipts," which provided that discounts for any purpose allowed and taken on sales should not be included, regarded the plaintiff as buying an advertising and promotion device, and not a device for reducing the price to its customers.

Reversing the trial court, the State Supreme Court ruled that the plaintiff retailer was not entitled to deduct from its gross receipts, as discounts, the cost to it of trading stamps given to customers.

Benner Tea Company v. Iowa State Tax Commission et al., CCH IOWA TAX REPORTS ¶200-015, 109 N. W. 2d 39. Evan L. Hultman, Attorney General, and Gary S. Gill, Special Assistant Attorney General, for appellants. Dailey & Dailey of Burlington, and Whitfield, Musgrave, Selvy, Fillmore & Kelly of Des Moines, for appellee.

state legislation

Connecticut—The rates of the sales and use taxes in Connecticut have been increased from 3% to 3½% on sales of 15¢ or more, effective July 1, 1961, by Senate Bill 1105 of 1961. Sales of 14¢ or less are taxed at the rate of 1.75%. New tax brackets have been provided for collecting the taxes.

Illinois—The Illinois Retailers' Occupation (Sales) Tax and Use Tax rates have been increased from 3% to 3½%, effective July 1, 1961, by Senate Bills 669 and 670, Laws of 1961. The rate had been scheduled to revert to 2½% on July 1, 1961. This makes the effective rate 4% in those municipalities and counties which impose the ½ of 1% municipal or county sales tax.

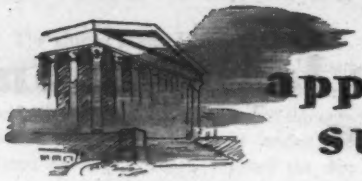
Minnesota—The date when withholding of personal income tax begins has been moved up from January 1, 1962 to October 1, 1961, by Chapter 91 of the First Special Session of 1961. The first quarterly return and payment will be due on or before January 31, 1962, covering the calendar quarter ending December 31, 1961. When withholding exceeds $25 in any month, deposits of such amount with the Commissioner of Taxation within 15 days after the close of such month will be required.

For the taxable years 1961 and 1962 the Minnesota corporation income tax rate has been increased, by Chapter 91 of the First Special Session of 1961. The basic income tax rate of 7½% and the temporary additional tax of 1.8% have each been increased by 10%, applicable to all taxable years beginning after December 31, 1960 and prior to January 1, 1963.

New Jersey—Assembly Bill Number 318 of 1961, the Emergency Transportation Tax Act, approved May 29, 1961, imposes a tax on the net income and net capital gain derived from New York sources by New Jersey residents and on the net income and net capital gain derived from New Jersey sources by New York residents. New Jersey employers are required to deduct and withhold the tax on and after July 1, 1961, from New York residents in their employ. The first returns and payments of the tax withheld will be due on or before October 31, 1961, for the quarter July 1, 1961 through September 30, 1961.

New Mexico—Effective January 1, 1962 as a result of the enactment of Chapter 197 of 1961, the rate structure of the corporation franchise tax has been changed from $1 for each $1,000 or fraction thereof of par value, to 55¢ for each $1,000 or fraction thereof, of the book value of the authorized and issued capital stock represented by property and business in New Mexico. The franchise tax will be due on or before June 1, rather than on or before May 1 as formerly provided, effective with respect to the franchise tax due on or before June 1, 1962. Effective January 1, 1962, the Annual Corporate Report will reflect the status of the corporation as of the last day of the preceding fiscal year, rather than as of the preceding January 1.

North Carolina—The tax on wholesale merchants of 1/20 of 1% of total gross sales has been repealed, effective July 1, 1961 by House Bill 1226, Laws of 1961. In addition, numerous changes have been made in the 3% retail sales and use taxes by Senate Bill 78, Laws of 1961, also effective July 1, 1961.



appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

ARIZONA. Docket No. 168. *State Tax Commission v. The Murray Company of Texas, Inc.*, CCH ARIZONA TAX REPORTS ¶ 200-070, Arizona Supreme Court, March 30, 1960. (The Corporation Journal, December 1960—January 1961, page 54.) Privilege (sales) tax—interstate commerce. **Petition for writ of certiorari filed, June 23, 1960. October 10, 1960:** *"Per Curiam*: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for clarification." (81 S. Ct. 53) **Opinion of the Arizona Supreme Court on remand reported at 89 Ariz. 61, 358 P. 2d 167,** CCH ARIZONA TAX REPORTS ¶ 200-082. **Petition for writ of certiorari filed, May 1, 1961; Docket No. 937. Certiorari denied, June 12, 1961.** (81 S. Ct. 1903)

MINNESOTA. Docket No. 931. *Dahlberg Co. v. Western Hearing Aid Center, Ltd.*, 107 N. W. 2d 381. (The Corporation Journal, June—July 1961, page 108.) Service on Secretary of State. **Petition for writ of certiorari filed April 27, 1961. Certiorari denied, June 19, 1961.** (81 S. Ct. 1921)

NEW JERSEY. Docket No. 203. *Eli Lilly and Company v. Sav-On-Drugs, Inc.*, CCH NEW JERSEY TAX REPORTS ¶ 200-146, 31 N. J. 591, 158 A. 2d 528. (The Corporation Journal, April—May 1960, page 329); affirming 57 N. J. Super. 291, 154 A. 2d 650. (The Corporation Journal, February—March 1960, page 308.) Doing business—enforcement of contracts. **Appeal filed, June 20, 1960. Jurisdiction noted, October 17, 1960.** (81 S. Ct. 102) **The motion of the State of New Jersey to be named a party appellee is granted, February 20, 1961.** (81 S. Ct. 689) **Argued March 20 and March 21, 1961. Judgment affirmed, May 22, 1961,** CCH NEW JERSEY TAX REPORTS ¶ 200-187 (81 S. Ct. 1316). **Rehearing denied, June 19, 1961.** (81 S. Ct. 1913)

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* Data compiled from **CCH U. S.** SUPREME COURT BULLETIN.

Discussions on Corporation Law

The Mutual Fund: A Structural Analysis, by Nathan D. Lobell. 47 Virginia Law Review, March, 1961, page 181.

English Law and American Law on Monopolies and Restraints of Trade, by Richard C. Bernhard. 3 Journal of Law and Economics, October, 1960, page 136.

Mechanics of Apportionment of Receipts from Shares of Stock, by Richard L. Grossman. 65 Dickinson Law Review, March, 1961, page 179.

Double Derivative Suits and Other Remedies with Regard to Damaged Subsidiaries, by William H. Painter. 36 Indiana Law Journal, Winter, 1961, page 143.

The Consent Decree in Antitrust Enforcement, by Charles F. Phillips, Jr. 18 Washington and Lee Law Review, Spring, 1961, page 39.

Why Should Manufacturers Want Fair Trade? by Lester G. Telser. 3 Journal of Law and Economics, October, 1960, page 86.

Foreign Investment and Operation in Mexico, by Fausto R. Miranda. 2 Arizona Law Review, Winter, 1960, page 187.

regulations and rulings

Connecticut — Out-of-state bank balances controlled and administered by officials at the corporation's principal place of business, located in Connecticut, have a tax situs in Connecticut for the purpose of apportionment of assets for computing the alternative minimum tax. Loans to an affiliated Connecticut corporation, made, recorded and payable in Connecticut also have a tax situs in the state, even though used to buy property operated in the taxpayer's intrastate and interstate business. The statute provides that the tax situs of intangibles is the principal place of business of the corporation unless clear, substantial and convincing proof is given that the assets are held as integral parts of business activities directed, controlled and managed outside the state. (Opinion of the Attorney General, CCH CONNECTICUT TAX REPORTS ¶ 200-041)

Florida — Where several mortgages, each encumbering separate parcels of land, were substituted for a single mortgage, encumbering the same separate parcels of land as a whole, both the original and substitute mortgages being to secure the same indebtedness, the substitute mortgages are not taxable for Class "C" intangible personal property taxes, where such taxes were paid when the original mortgage was recorded. (Opinion of the Attorney General, CCH FLORIDA TAX REPORTS ¶ 200-338)

Kentucky — Where a taxpayer may have a choice of counties in which to list his property and voluntarily lists it in the county of his domicile, the property is taxable in the county where listed, even though it is located in another county on the assessment date. (Opinion of the Attorney General, CCH KENTUCKY TAX REPORTS ¶ 200-247)

Nevada — The publication of a statement of "last year's business" required of foreign corporations by NRS 80.190, means for the calendar year. A corporation qualifying to do business in Nevada on July 21, 1960, must publish and file before or during March, 1961, and report on business done from July 21, 1960, to December 31, 1960, even though it operates on a fiscal year basis. (Opinion of the Attorney General to the Secretary of State, CCH NEVADA TAX REPORTS ¶ 200-256)

New Jersey — A foreign savings and loan or foreign building and loan association, national bank having its principal office in a state other than New Jersey, or foreign state bank, which forecloses a mortgage on New Jersey real estate and subsequently manages the property for the purpose of rental collection, is not subject to taxation under the New Jersey Corporation Business Tax Act. (Opinion of the Attorney General, CCH NEW JERSEY TAX REPORTS ¶ 200-186)

Ohio — The fee that a corporation must pay for increasing its authorized number of shares is based solely on the additional number of authorized shares. Such consideration as the par value of the shares, the authorized capital of the corporation, or the fact that the additional shares are to be used for a stock split are irrelevant in computing the fee. (Opinion of the Attorney General, CCH OHIO TAX REPORTS ¶ 200-102)

Articles of incorporation must designate the place in Ohio where the principal office of the corporation is to be located. "Place" means the city, village or township and the county. (Opinion of the Attorney General, CCH OHIO TAX REPORTS ¶ 200-018)

some important matters

For August and September

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Arkansas — Annual Franchise Tax due on or before August 10.—Domestic and Foreign Corporations.

California — Franchise Tax based on net income. Second installment due on or before September 15.—Domestic and Foreign Corporations.

Idaho — Annual Statement and Annual License Tax due between July 1 and September 1.—Domestic and Foreign Corporations.

Kentucky — Report of Unclaimed Dividends, etc., due on or before September 1.—Domestic and Foreign Corporations.

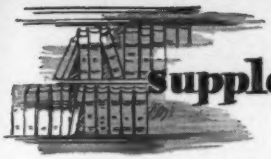
Maine — Annual Franchise Tax due September 1; delinquent one month later.—Domestic Corporations.

Massachusetts — Report of Abandoned Property due on or before September 1.—Domestic and Foreign Corporations.

Oklahoma — Annual Franchise Tax Report and Tax due between July 1 and August 31.—Domestic and Foreign Corporations.

Quebec — Annual Return to Provincial Secretary due on or before September 1.—Domestic and Foreign Corporations.

Wisconsin — Second Installment of Income Tax due on or before August 1.—Domestic and Foreign Corporations.



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